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No. 00-957

IN THE
Supreme Court of the United States

STATE OF KANSAS, *Petitioner,*

v.

MICHAEL T. CRANE, *Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KANSAS

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPS. TODD TIAHRT AND JIM RYUN, ALLIED EDUCATIONAL FOUNDATION, THE STEPHANIE ROPER COMMITTEE AND THE STEPHANIE ROPER FOUNDATION, AND THE MARYLAND COALITION AGAINST CRIME AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.* -- which provides for the civil commitment and long-term care and treatment of sex offenders who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality or personality disorder; and (2) to present a continuing danger to soeiety through a likelihood of committing future sexually violent offenses -- violate substantive due process principles?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to criminal justice reform and crime victims' rights. In particular, WLF has appeared before this Court as well as other federal and state courts in numerous cases involving the rights of society to incarcerate dangerous individuals in order to protect public safety. *See, e.g., Ashcroft v. Ma,* No. 00-38 (U.S., argued Feb. 21, 2001); *Zadvydas v. Underdown,* No. 99-7791 (U.S., argued Feb. 21, 2001); *Kansas v. Hendricks,* 521 U.S. 346 (1997).

U.S. Representatives Todd Tiahrt and Jim Ryun are Members of Congress from Kansas. They support the right of Kansas to take appropriate measures to protect its citizens from the actions of sexually violent predators.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Stephanie Roper Committee, Inc. and the Stephanie Roper Foundation are nonprofit organizations based in Upper

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

Marlboro, Maryland. The Committee and Foundation were founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Committee has worked for the adoption of victim rights legislation, both at the state and federal levels. The Committee and Foundation (which has more than 11,000 members in all 50 states) provide a broad array of services to crime victims.

The Maryland Coalition Against Crime is based in Baltimore, Maryland and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. It devoted considerable resources toward adoption of the "Victims' Rights Amendment" to the Maryland Constitution.

Amici are deeply concerned by the level of sexually oriented violent crime being committed in our society. Statistics indicate that those committing such crimes tend to be repeat offenders who have demonstrated an inability to control their antisocial behavior. *Amici* believe that the only way to protect the general public from such crimes is to incapacitate those shown highly likely to commit such crimes until they can be taught to conform their conduct to societal norms.

Amici submit this brief in support of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, Respondent Michael T. Crane has been convicted on two occasions of crimes involving sexual predation. He was convicted of lewd and lascivious behavior after exposing himself to a tanning salon attendant. *State v. Crane,* 260 Kan. 208, 918 P.2d 1256 (1996). He was also convicted of aggravated sexual battery after attacking a video store clerk, exposing his genitals to her, attempting to force her to perform oral sex, and threatening to rape her. Petition Appendix ("Pet. App.") 3a.

The Kansas legislature adopted in 1994 the Kansas Sexually Violent Predator Act (the "Act"), Kan. Stat. Ann. § 59-29a01, *et seq.*, to address the public safety problems caused by recidivist sexual offenders. The Act provides for the incapacitation and treatment (with a goal of eventual release) of anyone found to be a "sexually violent predator." The Act defines a "sexually violent predator" as anyone who:

(1) has been "convicted or charged with a sexually violent offense"; and

(2) "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."

K.S.A. § 59-29a02(a). At least one of the crimes of which Mr. Crane has been convicted, aggravated sexual battery, is

included within the Act's definition of "sexually violent offense." K.S.A. § 21-3503. The Act includes numerous procedural safeguards for those subject to its terms, including the right to counsel during any commitment proceedings, the right to a jury trial, and a prohibition against incapacitation unless the person subject to the law is found "beyond a reasonable doubt" to be a "sexually violent predator." Pet. App. 7a-8a.

Those incapacitated under the Act have the right to treatment of their mental abnormality/personality disorder and to release as soon as their mental condition "has so changed that the person is safe to be at large." K.S.A. § 59-29a07. Continued incapacitation is subject to mandatory annual review; if the court conducting the review determines that probable cause exists that the incapacitated person "will not engage in acts of sexual violence if discharged," the person is entitled to a hearing with the full panoply of procedural protections that were in place for the initial hearing. K.S.A. § 59-29a08.

Near the end of the four-year prison term that Mr. Crane was serving for his aggravated sexual battery conviction, Kansas brought proceedings against him under the Act, seeking to have him adjudicated a "sexually violent predator." Pet. App. 3a. At the August 1998 incapacitation trial, several psychologists called as witnesses by Kansas testified that Mr. Crane suffered from two personality disorders -- antisocial personality disorder and exhibitionism -- and that those disorders made it likely that if released, he would engage in predatory acts of sexual violence. *Id.* at 3a-4a.

Mr. Crane introduced no evidence in his own behalf. *Id.* at 25a. At the conclusion of Kansas's case, he moved for a directed verdict, asserting that Kansas had failed to introduce any evidence of lack of "volitional control"; *i.e.*, evidence that a mental defect rendered him unable to control his violent behavior. *Id.* The trial judge denied the motion, *id.*; he instructed the jury that in order to establish that Mr. Crane was a sexually violent predator, Kansas had to prove beyond a reasonable doubt that: (1) Mr. Crane had been convicted of aggravated sexual battery; and (2) he "suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined to a secure facility." *Id.* at 6a. The judge denied Mr. Crane's request that he instruct the jury that Kansas bore the burden of demonstrating that Mr. Crane could not control his dangerous behavior. *Id.* at 25a. The jury returned a unanimous verdict that Mr. Crane was, beyond a reasonable doubt, a sexually violent predator, and the judge ordered Mr. Crane committed to State custody for "control, care and treatment." *Id.*

The Kansas Supreme Court reversed and remanded for a new trial. *Id.* at 1a-20a. The court held that Mr. Crane's civil incarceration violated his "substantive" right under the Fourteenth Amendment's Due Process Clause to be free from unwarranted restraints on personal liberty. *Id.* at 11a-12a. The court noted that this Court had considered and rejected a substantive due process challenge to the Act in *Kansas v. Hendricks*, 521 U.S. 346 (1977). The court interpreted *Hendricks* as reading into the Act a requirement that individuals could not be held under the Act unless they were shown incapable of controlling their sexually predatory

behavior, and as holding that a civil detention law would violate substantive due process in the absence of such a requirement. *Id.* at 11a. Accordingly, the court stated, the trial court erred in failing to instruct the jury regarding that requirement. *Id.* at 12a.[2]

The court went on to reject Mr. Crane's other constitutional claims. The court held that Mr. Crane's incarceration violated neither the Double Jeopardy Clause nor the Ex Post Facto Clauses, because those provisions apply only to penal statutes and the Act is civil in nature. *Id.* at 12a-16a. Mr. Crane has not sought review of those holdings in this Court. Thus, the only issue before the Court is Kansas's challenge to the Kansas Supreme Court's holding that substantive due process precludes the civil commitment of those whose mental defect makes them likely to engage in predatory acts of sexual violence, in the absence of a explicit finding that the defendant cannot control his dangerous behavior.

SUMMARY OF ARGUMENT

Individual liberty is a value deeply rooted in American society. Nonetheless, society has regularly countenanced significant restraints on individual liberty where its interests in imposing such restraints have been deemed sufficiently weighty. Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty, including

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[2] The court noted that there was evidence upon which the jury could have found that Mr. Crane's mental disorder rendered him incapable of controlling his dangerous behavior. *Id.*

detention of those who pose the greatest threats to public safety, in order to carry out that function.

Amici recognize that preventive detention laws pose a serious threat to individual liberty unless carefully circumscribed. *Amici* do not support the right of a State to incapacitate an individual indefinitely based solely on ill-defined fears that the individual might break the law in the future. Nonetheless, such laws are permissible provided: (1) they are limited to cases in which the legislature has a strong basis for predicting the detainee's dangerousness; (2) they are not designed to punish past misbehavior; and (3) the detention is subject to mandatory periodic review.

The Kansas Sexually Violent Predator Act meets all of those requirements. The Act does not mandate preventive detention for all dangerous individuals, only for those who are highly likely to commit violent sex crimes -- a crime which the Kansas legislature has found to be subject to very high recidivism. The Act ensures that only the most dangerous individuals are detained, by limiting potential detainees to those who: (1) have been convicted or charged with a sexually violent offense; and (2) suffer from either a "mental abnormality or personality disorder" which makes them likely to commit sex crimes. Nothing in the Act suggests an intent to punish individuals for past misconduct; the Act speaks only of a desire to prevent future crime, and Mr. Crane has produced no evidence suggesting a basis for doubting Kansas's good faith on that score. Finally, the duration of detention under the Act is strictly limited; those detained must be released as soon as they are "safe to be at large," and in no event may they be held for more than one

year unless a judge has reviewed their situations and found them to be continued threats to public safety.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court upheld Kansas's use of the Act to impose civil detention on a man who was found likely to commit predatory acts of sexual violence unless detained. Eight members of the Court rejected the man's claim that detention violated his due process liberty interests. Nearly identical findings have been made with respect to Mr. Crane. *Hendricks* cannot meaningfully be distinguished and mandates a finding that Mr. Crane's substantive due process claims should be similarly rejected. The Kansas Supreme Court misinterpreted *Hendricks* by reading into it a prohibition against civil detention in the absence of an explicit finding that the detainee cannot control his dangerous behavior. *Hendricks* imposed no such prohibition; indeed, the Court upheld the detention of the defendant in that case even though the jury was never instructed that detention could be imposed only on those incapable of controlling their own behavior. *Hendricks* mandated no more than that the State demonstrate that the detainee's mental problem is what causes him to be likely to engage in dangerous activity. Because Kansas met that standard in this case, it has complied fully with the Due Process Clause.

ARGUMENT

I. DANGEROUS INDIVIDUALS DO NOT POSSESS A SUBSTANTIVE DUE PROCESS RIGHT TO BE FREE FROM PREVENTIVE DETENTION OF LIMITED DURATION

The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987)(quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits a state to protect its citizens by imposing finite periods of detention on those who have been found beyond a reasonable doubt to be highly likely to commit sexually violent crimes if not detained. The average citizen expects protection from all such individuals, regardless whether those

being detained are wholly incapable of controlling their impulses to engage in such violent crimes.

Amici recognize that individual liberty is a value deeply rooted in American society. Nonetheless, the federal and state governments have regularly countenanced significant restraints on individual liberty where society's interests in imposing such restraints have been deemed sufficiently weighty. No one seriously questions, for example, that government may constitutionally incarcerate those found to have violated the criminal laws, or that government has broad discretion to define what constitutes criminal conduct.

In the civil context as well, the Court has regularly upheld the government's power to require the sacrifice of individual liberty for the sake of the common good. For example, in *Arver v. United States,* 245 U.S. 366 (1918), the Court rejected claims that conscription into the armed forces violated substantive due process, even in times of war. The Court has also upheld compelled vaccinations designed to promote the public health, despite objections that vaccinations can result in permanent injury and death. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). The Court explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

Id. at 26.[3] *Jacobson* also recognized the right of government to hold citizens in quarantine against their will in order to prevent the spread of disease. *Id.* at 29. *See also O'Connor v. Donaldson,* 422 U.S. 563, 582-583 (1975) (Burger, C.J., concurring)("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty in order to carry out that function. As the Court has recognized in *Schall v. Martin,* 467 U.S. 253 (1984), "The 'legitimate and *compelling* state interest' in protecting the community from crime cannot be doubted." *Schall,* 467 U.S. at 264 (quoting *De Veau v. Brainsted,* 363 U.S. 144, 155 (1960))(emphasis added). *Schall* rejected a substantive due process challenge to a New York law that permitted pre-trial detention of those charged with juvenile offenses.

The Court has recognized that determining how far government may go in sacrificing individual liberty in pursuit of the common good entails a balancing process:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is neces-

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[3] In reaffirming in *Hendricks* that "an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context," the Court cited approvingly to the quoted passage from *Jacobson*. *Hendricks,* 521 U.S. at 356-57.

> sary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

This balancing process was played out in detail in *Salerno,* in which the Court upheld pretrial detention of those charged with serious federal crimes as a means of preventing them from committing additional crimes. Among the factors cited by the Court as tipping the balance in favor of upholding the pretrial detention law were: (1) the detention was limited in duration -- it could not continue beyond trial; (2) only those charged with particularly serious crimes could be held; and (3) the government was required to show that the detainee presented a demonstrable danger to the community and that no conditions of release would reasonably assure community safety. *Salerno,* 481 U.S. at 750. The Court noted:

> There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . . We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.

Id. at 747-748.[4]

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[4] Among the cases cited by the Court for that proposition were (continued...)

Each of the three factors cited by *Salerno* as tipping the balance in favor of civil detention in that case are present in this case. First, no one may be indefinitely committed under the Act. Rather, one year is the maximum amount of time that an individual can be forced to remain incapacitated pursuant to a single judicial proceeding. If Kansas wishes to continue the detention beyond one year, the presiding judge must determine that there is *no probable cause* to believe that the detainee no longer presents a danger, or the finder of fact must again determine *beyond a reasonable doubt* that the detainee is a sexually violent predator. Moreover, the detainee is entitled to immediate release under the Act if, at any time, (s)he is adjudged "safe to be at large." K.S.A. § 59-29a07.

Second, the Act is limited to a very small class of dangerous individuals: those who are likely to commit violent sex crimes. The Kansas legislature has not engaged in a blunderbuss effort to sweep all potential undesirables from the streets; rather, it has focused its attention on a particularly destructive type of violent crime and on a group the legislature has found to be particularly prone to recidivism. As the Court recognized in *Schall*, the government's interest in preventive detention is particularly strong

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[4](...continued)
Ludecke v. Watkins, 335 U.S. 160 (1948)(approving unreviewable executive power to detain enemy aliens in time of war); *Moyer v. Peabody,* 212 U.S. 78, 84-85 (1909)(rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection); and *Carlson v. Landon,* 342 U.S. 524, 537-542 (1952) (detention of potentially dangerous resident aliens pending deportation proceedings). *Salerno,* 481 U.S. at 748.

when those being detained are part of a group with high rates of recidivism. *Schall,* 467 U.S. at 265.

Third, the Act limits civil detention to those few for whom an extremely strong showing of dangerousness can be made. The Act's "beyond a reasonable doubt" standard of proof (a much stricter standard than the "clear and convincing evidence" standard often used in commitment statutes) significantly limits the group of dangerous individuals who can be made subject to the Act. Moreover, the Act requires significantly more than evidence of past bad acts in order to prove a likelihood of future misconduct. Kansas must also demonstrate that the propensity to commit violent sex crimes is based on a "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." K.S.A. § 59-29a02(a). Tying the finding of future dangerousness to medical evidence regarding the detainee's mental condition significantly improves the precision of the dangerousness prediction at the same time that it restricts the pool of those subject to detention.[5] As the Court noted in rejecting a previous challenge to the Act, "The numerous procedural and

[5] By pointing approvingly to the "mental abnormality or personality disorder" requirement, *amici* do not mean to suggest that some type of mental defect need be demonstrated in order to justify civil detention of those deemed dangerous. Rather, *amici* view that requirement as simply one method by which a state can tip the constitutional balance in favor of a preventive detention measure, both by narrowing the potential for intrusion on individual liberty and by increasing the likelihood that detention will actually promote public safety. Cases such as *Salerno* and *Jacobson* refute any suggestion that the Constitution limits civil detention of dangerous individuals to those whose dangerousness is caused by a mental defect.

evidentiary protections afforded here demonstrate that the Kansas legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards." *Hendricks,* 521 U.S. at 364.

Indeed, the experience in Kansas and other States indicates that civil detention laws for sexual predators have been applied sparingly, and that only a small minority of those identified by State authorities as meeting the statutory criteria actually end up being subject to detention. For example, a recent study examined implementation of detention laws in 11 States (including Kansas) through the summer of 1998. The study determined that while more than 2,200 sex offenders had been referred for possible detention, only 422 were actually ordered detained. Roxanne Lieb and Scott Matson, "Sexual Predator Commitment Laws in the United States: 1998 Update," Washington State Institute for Public Policy (Sept. 1998) at 10 (available at www.wa.gov/wsipp). When civil detention proceedings went all the way to trial, the jury decided against detention in a majority of cases. *Id.* Those figures indicate that the procedural and evidentiary protections for defendants that Kansas and other States have built into their sexual predator commitment statutes have been successful in ensuring that the statutes are not applied indiscriminately and that detention is being limited to only the most dangerous of sexual predators.

Amici recognize that no prediction of future dangerousness can be 100% accurate. But as the Court has recognized, the potential imprecision of such predictions is not grounds for prohibiting all government action. For example, while recognizing uncertainty among psychiatrists

regarding whether a mentally ill person who has committed a criminal act is likely to commit additional criminal acts (and thus whether the person should be civilly committed based on dangerousness), the Court in *Jones v. United States,* 463 U.S. 354 (1983), rejected claims that such uncertainty prohibits legislatures from addressing the issue:

> We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . ." *Greenwood v. United States,* 350 U.S. 366, 375 (1956). . . . The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.

Jones, 463 U.S. at 364 n.13. *See also Hendricks,* 521 U.S. at 358 ("[F]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.") (quoting *Schall,* 467 U.S. at 278).

While reducing danger to society at large is the touchstone of civil detention, *amici* do not mean to suggest that a demonstration of future dangerousness should ever, by itself, be sufficient to justify civil detention. To the contrary, as *Hendricks* explained, "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."

Hendricks, 521 U.S. at 358. Rather, proof of dangerousness must be combined with "proof of some additional factor." *Id.* But while proof that the detainee's dangerousness is the product of some sort of mental defect can serve as the mandatory "additional factor" (*id.*),[6] the Court has never suggested that it is the *only* "additional factor" that can serve to justify civil detention. Such a rule would make no sense; it would suggest that individuals whose dangerousness is caused by a mental defect deserve to be treated more harshly than equally dangerous individuals who are of sound mind but nonetheless habitually choose to commit violent crimes.

The reason that the Court has required "proof of some additional factor" is not a desire to discriminate against those suffering mental health problems, but a fear that government power to detain dangerous individuals, if left unchecked, would be subject to considerable abuse. A government bent on suppressing dissent might be able to manufacturer evidence that its political opponents are "dangerous" and thus subject to indefinite detention. By requiring "proof of some additional factor," the Court is ensuring that preventive detention statutes can never be applied indiscriminately to a broad range of citizens. But so long as state law sufficiently cabins the discretion of public safety officials by mandating both that civil detainees pose a threat to public safety *and* that there is some "additional factor" that strictly limits the pool of potential detainees, the likelihood of abuse of detention powers is significantly reduced. Under those circumstances, civil detention does not violate the Due Process Clause, regardless whether the detainee suffers from a mental defect.

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[6] Indeed, Kansas amply demonstrated that Mr. Crane's dangerousness was the product of his personality disorder.

As noted above, Kansas officials have chosen to detain Mr. Crane only after determining that he falls within a narrow class of particularly dangerous individuals. That determination, when combined with the strict procedural standards mandated under the Act, was more than sufficient to justify Mr. Crane's detention; that Kansas also demonstrated that Mr. Crane's dangerousness was the product of a mental defect (an antisocial personality disorder) was simply icing on the cake.

In sum, Mr. Crane has failed to demonstrate that Kansas's curtailment of his individual liberty under the facts of this case "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Salerno,* 481 U.S. at 751 (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934)), or otherwise "shocks the conscience," *id.* at 746; accordingly, his continued detention does not violate his substantive due process rights.[7]

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[7] The Court has stated that "evidence that a practice is followed by a large number of states . . . is plainly worth considering in determining whether the practice" offends basic principles of justice and thus violates substantive due process. *Schall,* 467 U.S. at 268. It is worth noting, therefore, that laws prescribing civil commitment for sex offenders have a lengthy pedigree in this country. By 1960 at least 26 states had adopted some form of civil commitment law for sex offenders. The Court rejected a due process challenge to one such law, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). A number of states have in recent years adopted laws substantially similar to the Kansas Sexually Violent Predator Act. *See, e.g., Seling v. Young,* 531 U.S. 250 (2001). It is difficult to believe that so many state legislatures would have adopted such laws if such laws objectively could be said to offend our nation's basic notions of justice.

II. THE STANDARD ADOPTED BY THE KANSAS SUPREME COURT WOULD REQUIRE COURTS TO MAKE PSYCHIATRIC DETERMINATIONS FOR WHICH THEY ARE ILL-EQUIPPED

The parties to this case disagree not so much about the facts of Mr. Crane's mental condition as they do about the legal significance to attach to his condition. The evidence at trial was uncontested that Mr. Crane suffers from a personality disorder (antisocial personality disorder combined with exhibitionism), and the jury found that his personality disorder made it likely that he would engage in future predatory acts of sexual violence unless he were detained in a secure facility. Antisocial personality disorder is a medical condition well-accepted within the medical community. Mr. Crane nonetheless contends (and the Kansas Supreme Court agreed) that his detention on the basis of that evidence violated substantive due process in the absence of an explicit finding that Mr. Crane is incapable of controlling his dangerous behavior.

That contention is without merit. *Hendricks* -- which upheld the civil detention of a convicted sex offender whose background cannot meaningfully be distinguished from Mr. Crane's -- and related decisions from this Court mandate a finding that Mr. Crane's detention does not violate his substantive due process rights. Indeed, efforts to distinguish *Hendricks* from this case would enmesh courts in detailed medical issues they are ill-equipped to resolve.

Mr. Crane's efforts to distinguish his situation from Mr. Hendricks's is reminiscent of Mr. Hendricks's efforts to distinguish *his* situation from that of individuals whose prior

detention had been upheld on the basis that their mental condition rendered them a danger to society. Mr. Hendricks admittedly suffered from a "mental abnormality" within the meaning of the Kansas law.[8] Citing *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *Addington v. Texas*, 441 U.S. 418 (1979), Mr. Hendricks argued that a mere finding of a mental abnormality did not supply the "additional factor" required under substantive due process standards to justify civil detention. *Hendricks*, 521 U.S. at 359. Rather, he argued, *Foucha* and *Addington* required nothing less than a finding that the detainee suffered from a "mental illness." *Id.* at 358-59.

The Court rejected that argument on the ground that it had never mandated use of any particular nomenclature in connection with civil detention proceedings:

> Contrary to Hendricks' assertion, the term "mental illness" is devoid of any talismanic significance. Not only do "psychiatrists disagree widely and frequently on what constitutes a mental illness," *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985), but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. *See, e.g., Addington, supra,* at 425-426 (using the terms

[8] A "mental abnormality" is defined under the Act as a "condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." K.S.A. § 59-29a02. The term "mental abnormality" is one coined by the Kansas legislature; unlike "personality disorder" (the mental condition ascribed to Mr. Crane), "mental abnormality" is not a term regularly used by the psychiatric community. *See Hendricks*, 521 U.S. at 359.

> "emotionally disturbed" and "mentally ill"); *Jackson v. Indiana*, 406 U.S. 715, 732, 737 (1972) (using the terms "incompetency" and "insanity"); cf. *Foucha*, 504 U.S., at 88 (O'CONNOR, J., concurring in part and concurring in judgment) (acknowledging State's authority to commit a person when there is "some medical justification for doing so").

Hendricks, 521 U.S. at 359. In connection with detention proceedings based on the defendant's mental condition, the Court deemed it sufficient for a State to demonstrate that there is a causal connection between the defendant's mental condition and the likelihood that he will engage in dangerous behavior. *Id.* at 359-60. The Court upheld civil detention under the Act of those (such as Mr. Hendricks) who suffered from a "mental abnormality," at least where the detainee's propensity for dangerous behavior was attributable to the mental abnormality and not to his wholly voluntary desire to commit violent crimes. *Id.*

Just as the Court rejected Mr. Hendricks's efforts to distinguish detention based on "mental illness" from detention based on a "mental abnormality," so too should the Court reject Mr. Crane's efforts to distinguish detention based on "mental abnormality" from detention based on "personality disorder." As *Hendricks* explained, there is no "talismanic significance" to the precise wording used to describe the mental condition of the defendant in a civil detention proceeding. *Id.* at 359.

To the extent that Mr. Crane argues that *Hendricks* is distinguishable because (unlike in this case) there was an explicit jury finding that Mr. Hendricks lacked volitional

control, he is in error. Under the Act, a defendant can be found to suffer from a "mental abnormality" (the mental condition ascribed to Mr. Hendricks) if the defendant has a "condition affecting the emotional *or* volitional capacity." K.S.A. § 59-29a02(b) (emphasis added). In other words, the jury could have ruled against Mr. Hendricks based on a finding of diminished "emotional capacity," without *explicitly* finding that he lacked "volitional capacity" to control his actions. But eight members of the Court nonetheless rejected Mr. Hendricks's substantive due process claim, presumably because they recognized that the statutory requirement that the mental abnormality be causally related to the defendant's dangerousness was sufficient to demonstrate that the defendant would have great difficulty trying to control his dangerous behavior. Similarly, although the jury was not explicitly instructed that Mr. Crane could not be confined unless he suffered from a volitional impairment, that was the practical effect of the judge's instruction that the jury should not find against Mr. Crane unless it found that his dangerousness was *caused* by his personality disorder. *See* Pet. App. 6a.

Moreover, efforts to attach constitutional significance to any distinction between Mr. Crane's and Mr. Hendricks's mental conditions would require the Court to delve far more deeply into the field of psychiatry than it has heretofore been willing to do. As the Court has recognized, "Psychiatry is not . . . an exact science." *Ake,* 470 U.S. at 81. Yet Mr. Crane is asking the Court to read into the Due Process Clause a distinction between a "mental abnormality" such as pedophilia (detention is constitutionally permissible) and a "personality disorder" such as antisocial personality disorder (detention is prohibited as a violation of substantive due

process). *Amici* respectfully suggest that given the imprecise nature of psychiatric diagnoses, there is no principled basis upon which the Court could make such distinctions.

In the past, the Court has expressed a willingness to defer to reasonable legislative judgments in this area. As the Court explained in *Jones,* "The lesson we have drawn [from the large degree of uncertainty in psychiatric diagnoses] is not that the government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments." *Jones,* 463 U.S. at 364 n.13. Kansas has determined that public safety demands that it be permitted to detain those past offenders whose mental condition makes it likely that they will engage in dangerous sexual behavior, regardless whether the mental condition is characterized as a "mental abnormality" or a "personality disorder." Kansas's decision to apply the Act to those (such as Mr. Crane) suffering from a personality disorder is reasonable, particularly because antisocial personality disorder is widely recognized within the psychiatric community as a disorder and Mr. Crane does not dispute his diagnosis. In the absence of evidence that Kansas is using the Act indiscriminately to detain large numbers of citizens, the Court ought to defer to that reasonable legislative decision.

III. THE DECISION BELOW WAS BASED ON A MISREADING OF HENDRICKS

The Court in *Hendricks* upheld the Act and ruled that Kansas had acted properly in imposing civil detention on Mr. Hendricks. Nonetheless, the Kansas Supreme Court in this case read *Hendricks* as far less than a ringing endorsement of

the Act; indeed, the Kansas court relied almost exclusively on *Hendricks* as the basis for its determination that Kansas's civil detention of Mr. Crane pursuant to the Act violated the Due Process Clause. The decision below was based on a serious misreading of *Hendricks*.

A. The Kansas Supreme Court Erroneously Concluded that *Hendricks* Did Not Uphold the Act as Written

As noted above (at 22-23), the Act does not preclude civil detention in the absence of an *explicit* finding that the defendant suffers a volitional impairment; *i.e.*, lacks the ability to control his dangerous behavior. The Court in *Hendricks* upheld civil detention of Mr. Hendricks despite the absence of a jury finding that he could not control his behavior. More importantly, the Court made clear that it was denying Mr. Hendricks's facial challenge to the Act and upholding it as written: "We hold that the Kansas Sexually Violent Predator Act comports with due process." *Hendricks*, 521 U.S. at 371.

Nonetheless, the Kansas Supreme Court interpreted *Hendricks* as holding that the Act was *not* constitutional as written. Rather, the Kansas court concluded, "[T]he Supreme Court read a requirement of inability to control behavior into the Act in order to uphold its constitutionality." Pet. App. 11a. Because Mr. Crane's jury did not make an explicit finding that Mr. Crane was incapable of controlling

his dangerous behavior, the court overturned the verdict directing that he be incapacitated.[9]

The Kansas court erred in concluding that *Hendricks*, in order to preserve the Act's constitutionality, read into the Act a requirement of an explicit finding that the defendant lacks volitional control. To the contrary, *Hendricks* is replete with statements indicating that the Act as written is facially valid. For example, after reviewing civil commitment statutes that had been upheld in previous cases, the Court concluded that the Act "is plainly of a kind with these other civil commitment statutes" and "consistent with the requirements of these other statutes *that we have upheld*." *Hendricks*, 521 U.S. at 358 (emphasis added). Moreover, although Kansas was detaining Mr. Hendricks based solely on the "mental abnormality" prong of the Act, numerous statements in the opinion indicated the Court's approval of the "personality disorder" prong of the Act as well. *See, e.g., id.* (The Act "requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder.'").

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[9] The Kansas court apparently recognized that Mr. Hendricks's jury similarly had failed to make an explicit finding that Mr. Hendricks was unable to control his dangerous behavior. But the Kansas court indicated that this Court must have concluded that that failure was not fatal to the case against Mr. Hendricks because his lack of volitional control was not contested -- Mr. Hendricks had conceded in his trial testimony that "when he becomes 'stressed out,' he cannot 'control the urge' to molest children." *Id.* at 8a (quoting *Hendricks*, 521 U.S. at 360). In the view of the Kansas court, *Hendricks* did not "focus on the Act's constitutionality"; rather, according to the court, *Hendricks* focused solely on whether Kansas was acting constitutionally in detaining Mr. Hendricks. Pet. App. 10a.

The Kansas court's interpretation of *Hendricks* is doubly implausible because it assumes that a federal court read a missing term into a State statute for the purpose of providing a saving construction. The Court has repeatedly held that federal courts are not authorized to provide saving constructions to State statutes by narrowing their scope, unless the narrowing construction is reasonable and readily apparent; only a State court may do so. *See, e.g., Stenberg v. Carhart,* 530 U.S. 914, 944 (2000); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1973).

The Kansas court did not claim to be invoking its own authority to provide a narrowing construction; indeed, in its view, neither the "mental abnormality" prong nor the "personality disorder" prong of the Act requires Kansas to demonstrate lack of volitional control:

> Kansas's statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression.

Pet. App. 8a. Rather, the Kansas court interpreted the Act as requiring an explicit finding of inability to control behavior solely because it interpreted *Hendricks* as having read such a requirement into the Act. *Id.* at 11a. As explained above, that was a clear misreading of *Hendricks*. Not only did *Hendricks* not read additional terms into the Act, it denied Mr. Hendricks's facial challenge to the Act as written, holding that the Act "comports with due process requirements." *Hendricks,* 521 U.S. at 371.

B. Contrary to the Kansas Court's Understanding, *Hendricks* Held that the Act's Treatment of the "Volitional Impairment" Issue Satisfied All Substantive Due Process Concerns

Hendricks held that proof of dangerousness is insufficient by itself to justify indefinite detention; rather, the Court held, due process demands "proof of some additional factor." *Id.* at 358. The Court explained that one possible "additional factor" relates to individuals who possess some mental defect that makes it difficult for them to control their dangerous behavior. *Id.* at 357-58. The Court on at least five occasions made reference to the detention of individuals whose mental condition makes it either difficult or impossible for them to control their dangerous behavior. *Id.* at 357, 358, 360, 362, 364.

The Kansas court seized on those references to conclude that *Hendricks* had held that substantive due process prohibits detention of individuals under the Act absent a specific finding that "the defendant cannot control his dangerous behavior." Pet. App. 11a. Because Mr. Crane's jury had not been instructed to find in Mr. Crane's favor unless it found that he was unable to control his own behavior, the court invoked its interpretation of *Hendricks* to overturn the jury's verdict.

The Kansas court's conclusion is a serious misreading of *Hendricks*. Nowhere in its opinion did the Court indicate that due process prohibits civil detention in the absence of an *explicit* finding of volitional impairment. To the contrary, the entire thrust of *Hendricks* is that by limiting detention to those whose propensity to dangerous behavior is the product

of a mental impairment, Kansas had successfully limited the scope of detention to those who have great difficulty controlling their own behavior.[10] On at least three occasions in its decision the Court rejected challenges to the Act precisely because the Act's causation requirement ensured that detention would be limited to those who found it difficult if not impossible to control their dangerous behavior. *Hendricks,* 521 U.S. at 357 (The Act is "of a kind" with detention statutes previously upheld by the Court because "[i]t requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' *that makes it difficult, if not impossible, for the person to control his dangerous behavior.*") (emphasis added); *id.* ("The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."); *id.* at 362 ("Those persons committed under the Act are by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior."). *Hendricks* makes clear that the Act satisfies the Due Process Clause's volitional impairment component by requiring clear evidence of "a present mental condition that creates a likelihood of such [dangerous] conduct in the future if the person is not incapacitated," *id.* at 357, and does not

[10] The Court's conclusion is eminently sensible. One's mental impairments generally are not viewed as something one adopts as a matter of free will. Accordingly, actions that are caused or made more likely as a result of one's mental impairments should logically be deemed as actions over which one lacks volitional control.

suggest that Kansas must also obtain an explicit judicial finding of volitional impairment before it may invoke the Act.[11]

If the Kansas court really were correct that *Hendricks* held that "commitment under the Act is unconstitutional absent a finding that the defendant cannot control his own dangerous behavior," Pet. App. 11a, one would have expected the Court at least to comment on Kansas's detention of Mr. Hendricks in the absence of a jury finding that he could not control his dangerous behavior. The absence of such comment is strong evidence that *Hendricks* did not require any such explicit findings.

[11] In discussing the Act's "personality disorder" prong, the Kansas court stated, "[In the present case, Crane suffers from a 'personality disorder,' which by definition does not include a volitional impairment." Pet. App. 11a-12a. That statement refers to the absence in the Act of any definition of "personality disorder." The court was not suggesting that those who suffer from personality disorders engage in dangerous behavior solely as a matter of free will; indeed, the great weight of medical literature is to the contrary.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

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